65

Supreme Court, U.S.
FILED

No. (1) 07-298 JUL 24 2007

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN HENRY FORD,
Petitioner Pro Se

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For Writ Of Certiorari
To The Third Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

John Henry Ford
338 Belmar Blvd.
Farmingdale, N.J. 07727
(732) 938-4713

Question Presented

WHETHER THE REQUIREMENTS OF DUE PROCESS UNDER THE FIFTH AMENDMENT HAS BEEN SATISFIED IN THE CASE SUB JUDICE?

Table of Contents

Page

Table of Authority _____ ii,iii

Opinions Below _____ iv

Jurisdictional Statement _____ iv

Constitutional and Statutory Provisions Involved _____ iv

Statement of the Case _____ 1, 2

Reasons for Granting Writ _____ 2

Conclusion _____ 19

Appendix:
A. Order and Opinion of District Court _____ 20 A
B. Order and Recommendation of District Court ____ 20 B
C. Order of Court of Appeals _____ 20 C
D. Petitioner's Affidavit Of Merit _____ 20 D

Table of Authority

	Page
Henderson v Frank, 155 F3d 159 (3rd cir 1998)	3,9,11
Haines v Kerner, 404 US 519, 30 L Ed 2d 652, 92 S Ct 594 (1972)	3
State of N.J. Ex Rel, Kudisch v Overbeck, 618 F Supp 196 (D.C.N.J. 1985)	5
Gregory v Chicago, 394 US 111, 89 S Ct 946 (1969)	5
Ex parte Bain, 121 US 1, 30 L ed 849, 75 S Ct 781	6
U.S. v Norris, 281 US 619, 74 L ed 1076, 50 S Ct 424	6
Cf Clyatt v U.S., 197 US 207, 49 L ed 726, 25 S Ct 429	6
Insurance Corp. Of Ir., Ltd. V Compagnie des Bauxites de Guinee, 466 US 694, 72 L Ed 2d 492, 102 S Ct 2099 (1982)	6
Philbrook v Glodgett, 421 US 707, 44 L Ed 2d 525, 95 S Ct 1893 (1975)	7
Clewis v Texas, 386 US 707, 18 L Ed 2d 423, 87 S Ct 1338 (1967)	8
Schneckloth v Bustamonte, 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041 (1973)	8, 9
Miller v Fenton, 796 F 2d 598 (3rd Cir 1986)	8
Procunier v Atchley, 400 US 446, 91 S Ct 485, 27 L Ed 2d 524 (1971)	8
Frazier v Cupp, 394 US 731, 89 S Ct 1420, 22 L Ed 2d 684 (1969)	8
Boulden v Holman, 394 US 478, 89 S Ct 1138, 22 L Ed 2d 433 (1969)	8
Blackburn v Alabama, supra, 352 US at 197, 77 S Ct at 284	8, 13
Fikes v Alabama, supra, 361 US at 197, 77 S Ct at 284	8
Hill v Lockhart, 474 US 52, (1985)	9
Dooley v Petsock, 816 F 2d 885 (3rd Cir 1987	9

Page

Jackson v Denno, 378 US 368, 12 L Ed 2d 908,
84 S Ct 1774 (1964) 9,10, 13
Strickland v Washington, 466 US 668,
104 S Ct 2052 (1984) 14
McMann v Richardson, 90 S Ct 1441,
397 US 770 (1970) 16
Pennsylvania ex rel. Herman v Claudy, 350 US 116,
76 S Ct 223, 100 L Ed 126 (1956) 16
Cf.Chambers v Florida, 309 US 227, 60 S Ct 472,
84 L Ed 716 (1940) 16
United States v Dixon, 308 F3d 299 (3rd Cir 2002) 16
United States v Powell, 269 F3d 175 (3rd Cir 2001) 16
United States v Mojica-baez, 229 F3d 292
(1st Cir 2000) 18

Opinions Below

District Court Order And Opinion dated July 19, 2006

District Court Order of Recommendation dated September 26, 2006

Third Circuit Court of Appeals Order dated April 12 2007

Jurisdiction

The Third Circuit Court of Appeals entered judgment on April 25, 2007, affirming the District Court decision denying request for Certificate of Appealability. Jurisdiction is invoked pursuant to Title 28 U.S.C. section 1257(a) in that petitioner is challenging the unconstitutional judgment of the courts below which violates due process of law.

Constitutional and Statutory Provisions

Due Process of Law under the Fifth Amendment of the United States Constitution

Fed.R.Cr.P. Rule 7(c)(1)

Fed.R.Cr.P. R Rule 12(b)(2)

Fed.R.Cr.P. Rule 16(a)(1)(G)

Title 18 U.S.C. section 3500

14 CFR Part 1, 121, 135, 91

49 U.S.C. 106 (g), 40113, 44701, Part 375

Fed.R. of Evid. Rule 702, 703, 705

Statemetent Of The Case

On April 28, 2004, a federal Grand Jury convened in Newark, New Jersey, and returned an eleven-court indictment charging petitioner with a series of violations directly related to the matter-at-hand. Initially, petitioner was represented by several attorneys during the pendency of this criminal matter before finalizing an "agreement of representation" with Henry E. Klingeman of Klingeman Turano LLC. On May 27, 2004, that agreement was sealed via a nonrefundable fee of $15,000.00 paid to Klingeman for a trial of up to a week's length with stipulations of an additional $5,000.00 per week. On August 2, 2004, Stephen Turano, Esq. began representing petitioner throughout the criminal proceedings.

On November 8, 2004, the Government and defense counsel appeared before the court for a Pretrial Conference. At this time, defense counsel requested an adjournment of trial date in order to retain an aviation expert in preparation for trial. The court granted defense counsel's request and the trial was adjourned five (5) months until April 5, 2005. on April 13, 2005, petitioner's trial commenced without the. expert witness, there were no expert reports filed nor was there any notice given indicating petitioner would testify in his defense.

The first day of trial was devoted to jury selection and opening argument. On the second day, the Government presented two witnesses referred to as fact witnesses. On the third day, without any semblance of a defense and the constant reminder that, quote, "there will be no jail time." Thus, to avoid a maximum penalty of sixty-years, petitioner pled guilty to Counts 3 and 4 charged in the indictment.

On October 14, 2005, petitioner was sentenced to a five-year term of probation on each count, to run consecutive for a total term of ten-year probation. The court also ordered as a condition of probation that petitioner reside in a community corrections center for a period of five-months and that he be

confined to his residence for an additional five-months. As a further special condition of probation, continuing the "already-active-freeze" on petitioner's assets prior to determining any criminal involvement, the court ordered petitioner not to involve himself in the aviation industry in any way. With stifled resources and almost totally ignorant of the law, while confined in the community corrections center petitioner filed a petition for writ of habeas corpus on May 5, 2006, contesting the legality of his conviction. On June 5, 2006, the Government filed answer in the habeas action. On June 15, 2006, the district court ordered case dismissed. On August 14, 2006, petitioner filed a 'notice of appeal' in the district court of origin. On April 12, 2007, the Third Circuit Court of Appeals adjudicated the 'notice of appeal' as a request for a certificate of appealability and denied the request. Subsequently, the current request for Supreme Court review followed.

Reasons For Granting The Writ

This court should grant certiorari for two reasons: The decision below is in direct conflict with constitutional law and Supreme Court precedent; the exceptional importance of this case serves to correct a gross miscarriage of justice and to reinforce the rule of law.

1. THE DECISION BELOW CONFLICTS WITH CONSTITUTIONAL LAW AND SUPREME COURT PRECEDENT.

The decision by the Third Circuit Court of Appeals not only conflicts with constitutional law and Supreme Court precedent, most importantly it conflicts with its own holdings. Only by way of a significant departure from the rule of law was the Appeals Court able to arrive at the conclusion that "petitioner failed to make substantial showing of denial of a constitutional right."

A. The Decision Below Conflicts with Constitutional Law.

The Third Court of Appeals adjudicated a matter with similar violations found in the case sub judice. In a case entitled Henderson v Frank, 155 F3d 159 (3rd Cir 1998), the court held as follows:

> "The constitutional defect defendant suffered at trial was a procedural, structural defect which undoubtedly had repercussions in plea bargaining, discovery and trial strategy that would not be cured by a lone evidentiary hearing. This is a much more sophisticated right and its analysis must always begin where the due process determination leaves off." Id. At 170.

Prior to clarifying his position, petitioner implores this Honorable Court to liberally construe the foregoing pleadings in accordance with the dictates of Haines v Kerner, 404 US 519, 30 L Ed 2d 652, 92 S Ct 594 (1972). While petitioner is not an attorney and primarily ignorant of the law prior to the alleged offense, petitioner does however possess a competent level of education. The above-mentioned violations articulated in Henderson are a reasonable facsimile of the infringements suffered in the case sub judice. Through a review of the record in this matter will indicate that petitioner included a claim of defective indictment. In the memorandum of points and authorities in support of petitioner's initial habeas action, pg. 2, lines 3 and 4 of the 'statement of facts' asserts that [the alleged charges have no basis in the criminal forum]. On pg. 9, lines 2 and 3 of the 'structural defect claim' asserts that [due process of law requires that all offenses against the laws of the United States be charged in an indictment]. That the initial habeas action presented controverted issues, there was no minimal consideration given regarding evidentiary finding to clarify those discrepancies. According to law, anytime there is controverted matter concerning issues of law, the truth-

seeking process of evidentiary findings are essential to resolving those contentions. Thus, the erroneous judgment and partial assessment of the facts on the part of the courts below can never withstand Fifth Amendment scrutiny. The Fifth Amendment of the United States Constitution states in part as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

The indictment [ensures] that the Grand Jury has had the opportunity to review evidence supporting, and find sufficient cause to charge a defendant with, each element of the offense. When a fact is not necessary for conviction of an offense-an offense passed into law by Congress-that fact becomes a 'factor' because it cannot by definition be an [element]. According to law, "the indictment or the information shall be a plain, concise and [definite] written statement of the essential facts constituting the charged offense. F.R.Cr.P. Rule (c)(1). To be sufficient, an indictment must allege each material element of the offense; if it does not, it fails to charge that offense. This requirement stems directly from one of the central purposes of an indictment: to ensure that the Grand Jury finds probable cause that the defendant has committed each element of the offense, hence justifying a trial, as required by the Fifth Amendment."

One of the essential elements of the offense charged in each and every count of the indictment in this matter was *used, operated and employed in interstate commerce*. **None of the aircraft involved in this case were "*used*," "*operated*" or "*employed*" in interstate commerce**, as the record and evidence will indicate. That being the case, in order for the Grand Jury to return an eleven-count indictment with the above-mentioned element included in each count, there had to be a [gross misrepresentation] of the facts on the

part of the [evidence collector], the prosecution. "Respecting the Grand Jury proceeding, the prosecutor may exercise considerable discretion in determining what should be presented to the Grand Jury. State of N.J. Ex Rel, Kudisch v Overbeck, 618 F Supp 196 (D.C.N.J. 1985), id. at 199. According to Webster's Dictionary, the term 'collect' often implies "a careful selection." And indeed this was a careful selection on the part of this particular prosecutor. Normally, unless someone intends to blow-up something or 'intentionally' endanger the lives of others, the type of offense represented in the case sub judice is primarily resolved administratively by the Federal Aviation Administration (referred to hereinafter as FAA). Therefore, in order to bridge the offense from the administrative forum to the criminal forum, the 'careful selection' of *used, operated and employed in interstate commerce* [had to be inserted in the indictment as a prerequisite]. It not only created a facial deficiency in the indictment but most importantly, it resulted in a crucial variance between the evidence and the indictment. Thus, government intrusion, prosecutorial misconduct and the manufacturing of evidence resulted in a constitutionally defective and bogus indictment causing a substantially grievous loss to petitioner.

As stated in the initial habeas action, the trumped up charges have no basis in the criminal forum in that there is no evidence to support them. Under Gregory v Chicago, 394 US 111, 89 S Ct 946 (1969), the Court held that:

> "[I]t is much a denial of due process to send an accused to prison following a conviction for a charge that was never made, as it is to convict him on a charge for which there is no evidence to support that conviction."

According to law, a district court lacks jurisdiction when an indictment alleges only a [nonoffense]. That *used, operated and employed in interstate commerce* was an

essential element of each and every count of the indictment rendered them [all] nonoffenses. The lack of evidence to substantiate the charged offenses is tantamount to charges not made in the indictment based upon deductive reasoning that "if there is no evidence, there is no offense" in that the evidence is proof of the offence. Decided in 1887, Ex parte Bain has been the rule governing indictments. The Supreme Court held that:

> "The Bain case, which has never been disproved, stands for the rule that a court [cannot] permit a defendant to be tried on charges that are not made in the indictment against him." Ex parte Bain, 121 US 1, 30 L ed 849, 75 S Ct 781. See also U.S. v Norris, 281 US 619, 74 L ed 1076, 50 S Ct 424. Cf Clyatt v U.S., 197 US 207, 49 L ed 726, 25 S Ct 429

That an indictment's failure to charge an offense constitutes a jurisdictional defect and because an indictment is jurisdictional, defendants [at any time] may raise an objection to the sufficiency of the indictment based on failure to charge an offense and the defect is "not waived by a guilty plea." Fed.R.Crim.P. Rule 12 (b)(2) provides as follows:

> "The failure of an indictment to charge an offense "shall be noticed by the court [at any time]" during the pendency of the proceedings."

Pendency meaning 'not yet decided,' as in the case at bar submitted for Supreme Court review. The great latitude afforded by F.R.Cr.P. Rule 12 (b)(2) is best expressed in the language of the following two cases. Under Insurance Corp. Of Ir., Ltd. V Compagnie des Bauxites de Guinee, 466 US 694, 72 L Ed 2d 492, 102 S Ct 2099 (1982), the court articulated the following:

> "Notably, jurisdictional defects, by contrast, [cannot

be procedurally defaulted]. As federal courts, we are courts of limited jurisdiction, deriving our power solely from Article III of the Constitution and from the legislative acts of Congress.

Also, under Philbrook v Glodgett, 421 US 707, 44 L Ed 2d 525, 95 S Ct 1893 (1975), the court articulated the following:

> "A federal court not only has the power but also the [obligation] "at any time" to inquire into jurisdiction whenever the [possibility] that jurisdiction does not exist arises."

A thorough examination of the facts in this matter clearly indicates that the courts below erroneously adopted a tunnel vision approach in favor of the plea colloquy as they sought to adjudicate this matter. But in light of a host of holdings and precedents indicating otherwise and directing the courts to be more analytical, like the prosecutor, it appears that they were clearly driven by a motivation substantially different from justice. A motivation which is clearly in conflict with the Fifth Amendment rights to due process of law.

B. The Decision Below Conflicts with Supreme Court Precedent.

An objective analysis of the "actual facts" in this matter will undoubtedly uncover various due process violations. According to Black's Law Dictionary, Eighth Edition, the term 'due process' is defined as follows:

> "The [conduct of legal proceedings] according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal."

The conduct of the proceedings in this matter was not confined to the plea colloquy, rather the conduct of the proceedings is contained in the entire record. The initial habeas action, a part of the post-conviction record, was submitted with an attached 'affidavit' indicating involuntariness of confession. Under Clewis v Texas, 386 US 707, 18 L Ed 2d 423, 87 S Ct 1338 (1967), the Supreme Court articulated the following:

> "As it is the established practice of this Court, that we, approach the question of voluntariness from an independent examination of the [whole record]. Id. at 707."

Elsewhere, the very same directive was held in Schneckloth v Bustamonte, 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041 (1973), where the Court stated, "Coercion is a question of fact to be determined from the totality of all the circumstances." The Third Circuit Court of Appeals adjudicated a similar matter in Miller v Fenton, 796 F 2d 598 (3rd Cir 1986), where the court held that:

> "To determine the voluntariness of a confession, the court must consider the effect that the totality of circumstances had on the will of the defendant." See, e.g., Schneckloth v Bustamonte, 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041 (1973); Procunier v Atchley, 400 US 446, 91 S Ct 485, 27 L Ed 2d 524 (1971); Frazier v Cupp, 394 US 731, 89 S Ct 1420, 22 L Ed 2d 684 (1969); Boulden v Holman, 394 US 478, 89 S Ct 1138, 22 L Ed 2d 433 (1969); Blackburn v Alabama, supra, 352 US at 197, 77 S Ct at 284, Fikes v Alabama, supra, 361 US at 197, 77 S Ct at 284.
>
> The question in each case is whether the defendant's will was overborne when he confessed.

See, e.g., Schneckloth v Bustamonte, supra, 412 US at 225-226.

So clearly and unequivocally, it is well established that "appropriate test" or correct standard of review for the question of voluntariness is [everything] that occurred as opposed to a single phase of the proceedings.

That petitioner has yet to be heard, even in the absence of an evidentiary forum, the trial transcripts are sufficient to make his case. Referring back to the Third Circuit Henderson case where the court mentioned the "constitutional defect suffered at trial was a procedural, structural defect with repercussions in plea bargaining, discovery and trial argument 'A' contained in the government's "answer" to the habeas petition, the government proceeds to counter petitioner's challenge of voluntariness of his plea and continues in argument 'B' on pg. 8. On pg. 7 of the government's "answer," lines 8 thru 10 states as follows:

> "To show the requisite prejudice in [plea] situations, a defendant must demonstrate that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v Lockhart, 474 US 52, (1985); see Dooley v Petsock, 816 F 2d 885 (3rd Cir 1987).

This particular counter is intended to negate petitioner's habeas challenge advanced regarding voluntariness of his plea. In Jackson v Denno, 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774 (1964), the Court held as follows:

> "If an issue of coercion is presented, the judge [may not] resolve conflicting evidence or arrive at his independent appraisal of "voluntariness of the confession," [one way or the other]. These matters we [must] leave to the jury (evidentiary forum, i.e.,

impartial fact-finder). Id. At 1781.

Also in Jackson v Denno, the Court stated as follows:

> "The procedures used in the trial court to arrive at its conclusion on the coercion issue progressively takes on added significance as the actual measure of the protection afforded a defendant under the Due Process Clause of the Fifth Amendment against the use of involuntary confessions. These procedures [must], therefore, be fully adequate to insure [a reliable and clear-cut determination] of the voluntariness of the confession, including the resolution of [disputed facts] upon which the involuntariness issue may depend." Id. at 1788.

That the Due Process Clause of the U.S. Constitution is the provision which prohibits the government from arbitrarily depriving a person of life, liberty and property, the erroneous the judgment of the courts below has clearly failed to yield to this overriding federal policy. In outright defiance of Supreme Court directives to employ the "correct analysis" on the question of voluntariness, the courts below have persisted in relying solely upon the plea colloquy. That petitioner has yet to have his claims decided on the merits and based upon the rule of law that it is "impermissible for [a trial judge, sitting alone] to determine the presence or absence of coercive factors," clearly vitiates the judgment below and necessitates a fair hearing on the merits.

Regarding the pretrial and trial phase of this matter, petitioner would like to turn attention to the government's "answer" on pg. 8 line 12. The government advanced the contention that, quote, "It was undoubtedly this overwhelming evidence that induced Ford to plead guilty to those counts." The pretrial transcript (referred to hereinafter as P.T.) dated 11/1/04, entitled 'Motions,' pg. 5, lines 20 thru 24 states as follows:

> Mr. Winston: At the defendant's request, the government [must] give to the defendant a written summary of any testimony that the government intends to use under Rule 702, 703, or 705 of the Federal Rules of Evidence during its [case-in-chief] at trial.

This particular exchange is in reference to the Jencks Act found in Title 18 U.S.C. section 3500. Under F.R.Cr.P. Rule 16 (a)(1)(G) there is a federal demand for disclosure or discovery articulated by the Appeals Courts in Henderson. This federal policy enables the accused to thoroughly assess the substantive evidence against him in an alleged prima facie case. When the prosecution has [made] a case to go to the jury, an accused must choose between the disadvantage of going to trial or the advantage of pleading out. Such decisions are "informed" decisions afforded by the above-mentioned federal rights under the Jencks Act. So the motivation to go to trial is highly predicated upon ones' ability to effectively meet *and* counter the prosecution's case-in-chief. And mind the Court, because we live under a capitalistic economic system, the decision to go to trial or not also becomes an economic decision, especially in view of $15,000.00 for a week's trial or an alternative of probation. That petitioner is a thirty-five plus years veteran in the Aviation industry with an extraordinary knowledge and skill level regarding the rules and regulations of the inner workings of the industry, he [**knew**] that the government had [made] this case, made as in manufactured. So petitioner proceeded with that level of confidence that the knowledge and information of the inner workings of the industry would unfold in a court of the law leading to his exoneration. But little did he know, due to ignorance of the law, that he would be [shanghaied] via a concerted effort with his advocate as *the* key player.

Turning attention to the very same 11/1/04 P.T. document on motions, pg. 19, lines 8 thru 10 states as

follows:

> "Now whether I have an expert to come in and say Biden is wrong or at least whether this expert can educate me as to what to ask Biden, that's what I'm looking for."

Turning attention to the government's answer to the initial habeas action, pg. 3, #3 states as follows:

> "On February 20, 2005, when Ford still had not retained an expert, the Court set a deadline of March 5, 2005, by which all of Ford's expert reports were to be filed. Despite the [additional time], Ford never retained an expert or submitted any expert report."

The additional time mentioned above was not requested by petitioner but was a five-month adjournment granted defense counsel in order to obtain an expert witness of which he failed to do so. Regarding defense counsel's uncertainly about retaining an expert witness, the Court had this to say, 11/1/04 P.T. document on motions, pg. 20, lines 10 thru 16 states as follows:

> THE COURT: Mr. Turano, the truth is that if you're not requesting a continuance to get an expert, and between now and the start of trial is more than enough time for you to gain whatever knowledge you need, among other things, let's not kid ourselves. **[You have a client who is not exactly unknowledgeable about these issues]**.
>
> MR. TURANO: That is absolutely true, your Honor.

With a $15,000.00 retainer received for a week's trial to afford the requisite procedural due process protections for his

client raises the question, "Why did counsel proceed to trial without an expert witness to effectively counter the so-called experts for the government, as is the rule, or in the alternative use his client as an expert witness?" The answer to the question can be found in the 11/1/08 P.T. document on motions, pg. 37, lines 20 thru 25 which states as follows:

> MR. WINSTON: You want me to address – the second one was just for reciprocal discovery. [**Mr. Truano notified me that he doesn't intend to introduce anything into evidence other than documents that we, the government, have made available to him. Unless there's a change in that, that motion is moot**].

Holding true to his assignment in this concerted effort to [railroad] petitioner in order to rectify a longstanding sour relationship between petitioner and the FAA, counsel effectively stifled petitioner's ability to present a defense in violation of due process of law. Such gross deprivations undoubtedly stamped petitioner's signature a forgery upon the plea documents.

Under Jackson v Denno, the Court held as follows:

> "[T]his Court has recognized that coercion can be mental as well as physical and the bloodline of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of [persuasion]." Blackburn v Alabama, 361 US 199, 206 80 S Ct 274, 279. Id. At 1788.

The mode of persuasion used by counsel to induce petitioner to plead out was clearly psychological coercion-

psychological pressure which overpowers an accused's mental resistance which induces involuntary confessions. The critical departure from normal standards that were so obvious to someone almost totally ignorant of the law, no physical evidence, no testimonial support whatsoever and a self-confessed lack of knowledge of the subject matter involved gradually eroded the will of petitioner. The mere thought of sixty-years in prison and the absence of any meaningful defense rendered petitioner a more susceptible subject for pleading and thus overwhelmed his will to be free. And so it was, caught between a rock and a hard place, petitioner pled out against his will which was clearly the lesser of the two evils.

The flipside of the case sub judice is best articulated by the High Court in Strickland v Washington, 466 US 668, 104 S Ct 2052 (1984), where the Court held as follows:

> "On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after-the-fact are exacerbated by the possibility that "evidence of injury" to the defendant may be missing from the record precisely because of the incompetence of defense counsel." Id. At 708.

First and foremost, a competent attorney briefed by petitioner for days prior to any pretrial hearings, as was counsel, would have undoubtedly retained an expert or in the alternative used petitioner as an expert witness. Without criminal background, petitioner posed no risk to the defense but his wealth of knowledge *and* experience was invaluable within the meaning of create a level playing field. That petitioner [knew] beyond any "possible doubt" that the aircraft in question was not 'used,' 'operated' or 'employed'

in interstate commerce, the first order of business for the defense was to attack the bogus indictment. The appropriate line of questioning by competent counsel states as follows:

Counsel: Sir, is it safe to say you are pretty well-versed and skilled in matters concerning the Aviation industry?

Expert Witness: That is correct.

Counsel: Do you consider yourself to be an expert in your field?

Expert Witness: Yes I do.

Counsel: And why is that, Sir?

Expert Witness: Because in twenty-five years in the industry there is very little I don't know and practically nothing I haven't done.

Counsel: Sir, can you tell the court the distinction between an aircraft involved in interstate commerce and one that is not?

Expert Witness: An aircraft authorized to use, operate and employ under interstate commerce operates under one of the various certificates, Part 121, 135, etc. Part 91 requires no certificate, it's simply rules and regulations governing private aircraft which [cannot] be used in interstate commerce.

Counsel: Can you clarify that a little more for the court, Sir?

Expert Witness: Absolutely, Section 14 CFR or Constitutional Federal Regulations is primarily the criterion governing conduct within the Aviation industry. Under 14 CFR part 1, 1.1 General definitions, under Authority: 49 USC 106 (g), 40113, 44701 states: "Commercial operator means a person, who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier or foreign air carrier or under the authority Part 375 of this Title. [**Where it is doubtful that an operation is for compensation or**

hire, the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself, a major enterprise for profit]."

Counsel: Sir, are you clearly and positively indicating to the court that private aircraft cannot be used, operated or employed in interstate commerce?

Expert Witness: That is correct?

A review of the record will clearly indicate that there was no such line of questioning on the part of counsel in this case. In spite of being thoroughly briefed on the issue days prior to any hearings, as this was the primary reason petitioner contested the alleged charges, there wasn't one iota of evidence indicating the slightest mention of this critical question of fact. Under McMann v Richardson, 90 S Ct 1441, 397 US 770 (1970), the Court held that:

"Neither do we have before us the uncounseled defendant, see Pennsylvania ex rel. Herman v Claudy, 350 US 116, 76 S Ct 223, 100 L Ed 126 (1956), nor the situation where the circumstances that coerced the confession have abiding impact and also taint the plea. Cf. Chambers v Florida, 309 US 227, 60 S Ct 472, 84 L Ed 716 (1940). It is not disputed that in such cases a guilty plea is property open to challenge." Id. At 1447.

Under United States v Dixon, 308 F3d 299 (3rd Cir 2002), the court held that:

"When assessing prejudice in the context of a plea, we must determine if, given the [entire record], including the defendant's individualized circumstances, criminal record, role in the offense, and concession for pleading guilty, it affirmatively appears likely that the errors [materially hampered] his or her ability to assess the risks and benefits of pleading guilty." United States v Powell, 269 F3d 175 (3rd Cir 2001). Id. At 235.

The 'totality of circumstances' contained in the record, that counsel consciously elected to proceed to trial 'without any evidence,' that counsel conflictingly precluded the accused from testifying in his own defense, that counsel's failure to explore critical defense options and severe lack of trial preparation undoubtedly created a cumulative effect enough to overburden the will of the accused, clearly establishes that the plea in this matter was no doubt "involuntary." That the courts below clearly and unequivocally [broke all the rules] whereby serving to exacerbate the effects of the ongoing hardship caused by the unlawful conviction undoubtedly indicates their erroneous judgment is in conflict with the constitutional demands of due process of law.

2. THE EXCEPTIONAL IMPORTANCE SERVES TO CORRECT A GROSS MISCARRIAGE OF JUSTICE AND TO REINFORCE THE RULE OF LAW.

The case sub judice is more than an alleged criminal issue, most importantly it is a community issue. That the accused in this matter is an African American male, another statistic victimized by government intrusion, highlights this matter in that the accused is not a drug dealer or gang member. Quite to the contrary, the accused is an outstanding member of the Africa American community. His line of work, his track record and reputation are in good standing irregardless of minor indiscretions within the Aviation industry. His support system, the African American community, are witnessing his current struggle within the criminal justice system and are extremely affected by it in that certain members of the community are familiar with the particulars of his case. That fundamental fairness is the touchstone of due process of law, petitioner isn't the only one waiting and watching for the results in this matter, the community is waiting as well.

As a community, we have seen repeated incidents of how injustice has affected decent members of the African American community which constantly serves to undermine community confidence in the courts and laws they are required to follow. Citing United States v Mojica-baez, 229 F3d 292 (1st Cir 2000), the Court held that:

> "Certain categories of error interfere with such basic and fundamental and constitutional protections that they go to the structure of our criminal law system. These [structural errors] require that convictions or sentences, be set aside without any examination of prejudice because, among other things it would be well-nigh impossible to determine the amount of harm. The harm caused by these types of errors is surely great." Id. At 309.

The harm caused in the case sub judice is surely great in that officers of the court are guilty of impropriety in the intentional disruption of the life of the accused. That our system of justice distinguishes itself by the administration of swift justice for acts of injustice, the gross miscarriage of justice in the case sub judice, once properly rectified will undoubtedly be relief not only to petitioner but the African American community as well.

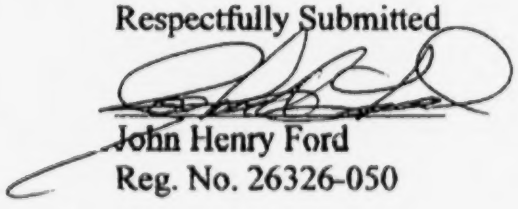
Regarding the rule of law, clearly nothing is perfect except our Creator, but according to the constitutional dictates and Supreme Court precedents set out in this petition, the courts below grossly overstepped their bounds in total disregard for our Constitution, Supreme Court guidance as well as their own holdings. It is imperative that the courts have high regard for the law otherwise by the actions below, clearly they invite anarchy. Petitioner is very much an advocate of our system of life, the American way, and loves and respects our country and the sacrifices we've made as a nation. But mind the Court, injustices of this magnitude that go uncorrected could undoubtedly turn a person bitter toward

our system of justice and to a certain degree, our way of life as well.

CONCLUSION

Wherefore, petitioner prays that this Honorable Court considers his constitutional claims on the merits. That the claims herein sufficiently charge a gross deprivation of federal rights guaranteed by the United States Constitution, and once proven, would entitle petitioner to the relief he seeks. That the unconstitutional judgment of the courts below in conjunction with the unlawful acts of the prosecution and counsel has severely disrupted petitioner's life the continued absence of justice in this matter only serves to exacerbate the hardship with each passing day. Thus, petitioner implores this Court to expedite evidentiary findings in this matter that the clear evidence of the defective indictment will justify setting aside the unlawful conviction with prejudice.

Respectfully Submitted



John Henry Ford
Reg. No. 26326-050

Dated: July 24, 2007.

APPENDIX

"A" – District Court Order and Opinion dismissing initial habeas petition

"B" - District Court Order of Recommendation denying request for Certificate of Appealability

"C" – Court of Appeals Order affirming District Court denial of Certificate of Appealability

"D" – Petitioner's 'Affidavit Of Merit'

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN FORD	x	
petitioner,	x	
	x	Civ. A No. 06-2019
	x	**ORDER**
UNITED STATES OF AMERICA	x	
respondent.	x	

THIS MATTER having come before the Court on petitioner John Ford's application for relief pursuant to 28 U.S.C. § 2255 based upon the contention that he was denied effective assistance of counsel; and the Government having submitted opposition to petitioner's application: and the Court having carefully reviewed the parties' submissions, and for the reasons set forth in the Court's Opinion issued on the date hereof, and for good cause shown,

IT IS on this 15th day of June, 2006,

ORDERED that petitioner's application is **DENIED**; and

IT IS FURTHER ORDERED that this case shall be deemed **CLOSED.**

s/ Stanley R. Chesler
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN FORD	x	
petitioner,	x	
	x	Civ. A No. 06-2019
v.	x	
	x	**ORDER**
UNITED STATES OF AMERICA	x	
respondent.	x	

CHESLER, District Judge

I. INTRODUCTION

This matter comes before the Court on petitioner John Ford's application to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Petitioner argues he received ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Specifically, petitioner argues his attorney failed to retain an expert witness or, in the alternative, allow him to testify as to technical issues in his own defense during the trial. (Petitioner's Br. At 3-8.) In essence, petitioner claims his inability to introduce export testimony "compelled [him] to abandon ship" and, consequently, he "pled out in order to live to fight another day..." (Id. at 2.) For the reasons that follow, petitioner's application is **DENIED**.

II. BACKGROUND

On April 28, 2004, a federal Grand Jury sitting in Newark, New Jersey returned an indictment charging petitioner with (1) willfully endangering the safety of a Hiller helicopter by installing worn-out parts, namely a timed-out tension torsion or "TT" pins, which secure the helicopter's rotor assembly (Count 1); (2) falsely certifying the

airworthiness of a Bell helicopter operated by the Monmouth County Shade Tree Commission, thereby endangering it during flight (Count 2); and (3) knowingly making false and fraudulent statements in helicopter log books by certifying maintenance work performed after defendant's license to repair aircraft and been revoked (Counts 3-11).

On or about November 8, 2004, after two continuances, the Court conducted a pretrial conference at which petitioner's counsel requested additional time to retain an aviation expert to counter anticipated testimony of the Government's experts. The government's experts were to testify about technical issues underlying Counts 1 and 2 of the Indictment. (See Exs. B and C to Government's Brief.) The Court granted petitioner's counsel's request and continued the trial until April 5, 2005.

On February 25, 2005, the court set a deadline of March 5, 2005 for all expert reports to be filed. Petitioner did not retain an expert or submit an expert report.

Petitioner's trial commenced on April 12, 2005. During the first two days, the Government introduced testimony of two fact witnesses. On the third day, without further testimony, the trial court concluded and petitioner pled guilty to counts 3 and 4 of the Indictment.

The Court conducted a sentencing hearing on October 14, 2005. The Court sentenced petitioner to a five-year term of probation on each count, to run consecutively; confinement to his residence for a period of five months; and confinement for an additional period of five months in a community corrections center, halfway house, or similar residential facility. As a further special condition of probation, the Court ordered that petitioner was not to involve himself in the aviation industry in any way. Petitioner did not appeal the sentence.

On May 5, 2006, while serving his term of residence at a

halfway house, petitioner filed the instant petition for habeas corpus relief under 28 U.S.C § 2255. Pursuant to the Court's Order, the Government submitted its response. The Court has received both submissions.

III. DISCUSSION

Under Strickland v. Washington, 466 U.S. 688 (1984), a petitioner claiming that his attorney's performance was deficient must demonstrate:

> that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. As a general matter, counsel is deemed effective if, considering all the circumstances of the case, his performance is reasonable under prevailing professional norms. Id. at 688. Counsel's conduct is not to be assessed through the distorting lens of hindsight, or deemed ineffective because the ultimate result was unsatisfactory to the petitioner. Id. at 689; Zettlemover v. Fulcomer, 923 F.2d 284, 296 (3rd Cir. 1991).

Petitioner's claim must be denied. First, petitioner cannot show prejudice by his counsel's alleged failure to retain an expert or to permit him to testify on technical issues because the violations to which petitioner pled guilty did not involve expert testimony. After two days of fact testimony, petitioner pled guilty to Counts 3 and 4. the bases for those charges were the representations petitioner made in a

helicopter log book. Specifically, the Government claimed petitioner knowingly and falsely stated he was certified by the FAA at a time when he was in fact not. Counts 1 and 2, which were dismissed, were the only counts that would have relied upon expert testimony. Relatedly, assuming, as petitioner has argued, that defense counsel prevented expert testimony from being introduced, he has failed to show how such testimony or that of an expert would have affected the outcome of his case. See Strickland, 466 U.S. at 694 (requiring a petitioner to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different..."). In short, the Court fails to see how the expert testimony that petitioner now argues was absent could impact the outcome of Counts that claimed he misrepresented his FAA license status. For these reasons, petitioner cannot show "prejudice" as required to prove ineffective assistance of counsel.

The Court further agrees with the Government's position that petitioner has failed to establish that his plea was not voluntary. A defendant who pleads guilty waives his right to challenge his conviction on any non-jurisdictional grounds other that the voluntariness of his plea. United States v. Brocc, 488 U.S. 563, 574 (1989); Tollett v. Henderson, 411 U.S. 258, 267 (1973). It is apparent from the Court's review of the Application For Permission to Enter Plea of Guilty that petitioner was aware of the Counts to which he was pleading guilty and indeed stated that he voluntarily entered into the plea agreement. Notably, the Application expressly states that defendant is "satisfied with the advice and help my lawyer has given me..." (Gov't Br., 1ix. D at para. 39.) Aside from the Application, the Court further questioned petitioner at the time of the plea hearing as to whether or not he was freely entering into the plea agreement, to which he responded he was. At no time during these proceedings did

petitioner complain about his alleged inability to introduce evidence during the trial. Given this evidence, and the lack of any evidence to the contrary, the Court finds that petitioner freely and voluntarily entered into the Plea Agreement.

IV. CONCLUSION

For the foregoing reasons, petitioner's application shall be **DENIED**, and this case shall be deemed **CLOSED**.

Date: June 15, 2006

S/ Stanley R. Chesler
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN FORD,	x	
Petitioner,	x	
	x	Civil Action No. 06-2019
v.	x	
	x	**ORDER**
UNITED STATES OF AMERICA,	x	
Respondent.	x	

CHESLER, District Judge

THIS MATTER having come before the Court on remand from the United States Court of Appeals for the Third Circuit, directing this Court to determine whether a certificate of appealability should issue, relating to this Court's Opinion of June 15, 2006, denying Petitioner John Ford's application for relief pursuant to 28 U.S.C. § 2255; and it

APPEARING that, under 28 U.S.C. § 2253 (c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right;" and it further

APPEARING that a substantial showing is made when "issues are debatable among jurists of reason; [or] a court could resolve the issues [in a different manner]; or [] the questions are adequate to deserve encouragement to proceed further,' Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983); and it further

APPEARING that Petitioner has not made a substantial showing of the denial of a constitutional right, and for good cause shown,

THEREFORE IT IS on this 25th day of September, 2006, **ORDERED** that it is the judgment of this Court that

no certificate of appealability shall issue.

S/ Stanley R. Chesler
United States District Judge

CLD-193 April 12, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 06-3836

JOHN HENRY FORD,

Appellant

VS.

UNITED STATES OF AMERICA

(D.N.J. CIV. NO. 06-CV-02019)

Present: RENDELL, SMITH AND JORDAN, CIRCUIT JUDGES

Submitted is appellant's notice of appeal which we treat as a request for a certificate of appealability under 28 U.S.C § 2253 (c)(1) in the above-captioned case.

Respectfully,

Clerk

MMW/SRF/clc

ORDER

We treat the foregoing notice of appeal as a request for a certificate of appealability. For substantially the reasons given by the district court, we conclude that jurist of reason would not debate the correctness of the district court's decision to deny appellant's motion to vacate his sentence under 28 U.S.C. § 2253 (c)(2); see also Miller-El v. Cockrell,

537 U.S. 322, 336-38 (2003).

By the Court

/s/ D. Brooks Smith
Circuit Judge

Dated: April 25, 2007
Mr. John Ford George S Leone, Esq.

No._____

IN THE
UNITED STATES SUPREME COURT

_____

John Henry Ford, petitioner

V.

United States Of America, respondent,

AFFIDAVIT OF MERIT

I, John Henry Ford, the Affiant herein, do hereby certify under the pains and penalties of perjury, pursuant to Title 28 U.S.C. section 1746, that all of the foregoing information is true and correct to the best of my knowledge, deposes and state:

1. That Affiant received the Appeals Court judgment on April 25, 2007, thirteen-days after the 12th of April, 2007, the date of issuance, was compelled to utilize the full 90-day time frame for filing certiorari;

2. That Affiant seeks Supreme Court review challenging the Appeals Court judgment regarding various due process violations that occurred during criminal proceedings in the District Court for the District of New Jersey;

3. That Affiant finalized a $15,000.00 "agreement of representation" with Henry E. Klingeman on May 27, 2004, based upon Klingeman's assurance that, quote, "We'll win;"

4. That Stephen Turano was substituted as counsel in spite of the agreement arranged with Klingeman;

5. That Affiant briefed Turano for days prior to any pretrial hearings regarding [all] of the factual issues surrounding the alleged offenses charged in the indictment;

6. That Affiant informed Turano that the indictment was

in error because none of the aircraft in question were involved in interstate commerce but were [all] private aircraft;

7. That Affiant thoroughly briefed Turano on FAA rules and regulations about how an aircraft in violation of its type certificate renders that vehicle a non-aircraft which no longer falls under Federal Aviation Regulations (referred to hereinafter as FARS) until restored to full compliance under an airworthiness certificate;

8. That all of the aircraft in the indictment were in violation of their type certificate which automatically self-revokes, self-cancels their airworthiness;

9. That on the third day of trial, Affiant realized the prior briefing had been [totally disregarded] and confronted with an option of sixty-years or probation, Affiant chose the lesser;

10. That prior to any pretrial proceedings, Turano kept reiterating, quote, "The plea was reasonable," and the fact that Affiant witnessed Turano act out his intended trial strategy of "submitting no evidence," Affiant was compelled to take the plea;

11. That had Affiant retained a competent attorney able to investigate the contentions demonstrated in the petition for certiorari and previous filings and execute the presentation of that exculpatory evidence, Affiant would go to trial again and would not have pled the first time.

Respectfully Submitted,

John Henry Ford
Reg. No. 26326-050
SGT. USMC
1922129

Submitted this 24 day of July, 2007.